United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,274

DAVID R. BUTLER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

50

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD GORDON
1120 Connecticut Avenue, N. W.
Washington 6, D. C.

Counsel for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Where wife of accused is witness to "criminal act" of husband in defense of sanctity of their marriage and home, is it plain error to allow her to testify: (1) to facts of "criminal act" committed in her presence, which accused husband contends constitute "confidential communications made during the marriage"; (2) to acts which accused husband contends were "confidential communications" between husband and wife; and (3) to oral "confidential communications" between husband wife pertaining to "criminal act"?

2. Did trial court err in failing to explain fully to wife of accused, who was planning to testify against her husband, the nature and extent of meaning of words "confidential communications" as used in D.C. Code Title 14-306(b)?

3. Where judge has ruled at trial that all witnesses be sequestered, is there an abuse of discretion in allowing the Government on rebuttal to put on a witness who was known to Government during the testimony in chief, to corroborate the main prosecution witness (wife of accused), where such witness sat in courtroom during portion of trial, in spite of rule on witnesses, and where such witness accompanied principal prosecution witness to courtroom and sat with her during portion of trial?

INDEX AND TABLE OF CASES

INDEX AND TABLE OF CASES
Continued

AUTHORITIES CITED

Cases:

STATUTES:

*Cases or authorities chiefly relied upon are marked by asterisks.

INDEX AND TABLE OF CASES
Continued

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,274

DAVID R. BUTLER, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, Section 1915, Title 28, United States Code, Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF CASE

In Criminal Action No. 902-64, DAVID R. BUTLER was charged in a single count indictment with second degree murder in violation of Title 22, District of Columbia Code 2403. The case came on for trial on February 1, 1965, and trial continued on

February 2, 1965, February 3, 1965, and February 4, 1965. On February 5, 1965, the jury returned a verdict of guilty of manslaughter. Subsequently, on March 12, 1965, the appellant was sentenced to imprisonment from 32 months to 8 years and the judgment and commitment were filed.

It is from this verdict and judgment that appellant appeals.

For the purposes of this appeal, the relevant facts are as follows:

On January 17, 1959, appellant was married to Doris R. Butler (Tr. 11). At all times up to and including the date of the trial, appellant and Doris R. Butler were married (Tr. 12). On September 5, 1964, while married to appellant, though living apart, Doris R. Butler, who at that time was living at the house of her mother, went "partying" at night with one Francis Henry Clark (Tr. 24). Upon her return at 4:30 A.M. to her mother's house in the 1100 block of Constitution Avenue, N.E., Washington, D. C., she had the car in which she and Francis Henry Clark were riding, stop in the middle of the 900 block of Constitution Avenue, N.E., and she and Francis Henry Clark got out of the car to walk to her house (Tr. 27). She testified that she got out of the car in the 900 block where she lived because her husband had told her that he had been watching her and that one of these days she was going to know that he, the husband, was watching her (Tr. 62-3).

She testified that she saw her husband approach, and he "yelled a bad name" (Tr. 28). She further testified that her husband then said to Francis Henry Clark that he was going to kill him (Tr. 29). She testified that she had seen the pistol used by her husband on a previous occasion (Tr. 39); that as she was walking up the street she saw the pistol in her husband's hand (Tr. 77); and in response to the question "And he had it [referring to the pistol] in his hand," she answered, "Yes, he was getting out of the car and reaching at the same time, and I knew it was coming out because I knew where he always kept his gun (Tr. 77). She further testified that Mr. Clark was fixing his shirt tail as he got out of the car but had nothing in his hand, and that subsequent to the shooting, she and appellant were conversing, wherein she said "If you kill me what is going to happen to the children," and he said "Take care of the children," got into his car, and left (Tr. 83).

Prior to the appellant's wife testifying, the attorney for appellant asked that she be apprised of her "constitutional rights" as to testifying against her husband (Tr. 13). Out of the presence of the jury, the judge interrogated the wife as follows:

> "THE COURT: It is my understanding that you have been advised by the Assistant United States Attorney in charge of this case. . . that you cannot be compelled to testify in this case, is that correct?
>
> THE WITNESS: Yes, I have.

THE COURT: Now, in order that we may be fully certain in this regard, I wish to say to you that while you are competent to testify, that is, you may testify, you cannot be compelled to testify either for or against your husband upon this trial. Do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Do you further understand that you are not competent to testify, that is, you cannot testify, even if you wish to, with reference to any confidential communications made by one of you to the other during the time that you were married? Are you aware of that?

THE WITNESS: Yes, I am.

THE COURT: Very well. Now, with the information that you cannot be compelled to testify in this case, would you state to the Court as to whether or not you wish to claim your privilege not totestify in this case?

THE WITNESS: I wish to testify." (Tr. 17).

Subsequent to this colloquy, the testimony referred to above was given.

At the conclusion of the Government's case, the appellant moved for a judgment of acquittal which was denied.

Thereupon, appellant testified as did several other witnesses. Subsequent to the presentation of the defense, the Government put on certain purported rebuttal witnesses. The last rebuttal witness was one Mary Alice Williams (Tr. 365). An objection was made to her bein; allowed to testify on the ground that she was present in the courtroom during a portion of the trial, and was actually sitting next to the chief prosecution witness (Tr. 360). Her testimony was corroborative

of the testimony in chief of Doris Butler in that she accompanied her when she went "partying" on Seotember 4, 1964. She further testified that she had been a friend of the wife of appellant since they were "kids" together (Tr. 384); that she just happened to come to the courtroom that day (Tr. 385); and that she walked into the courtroom with Mrs. Butler (Tr. 386).

Appellant challenged generally her right to appear as a witness and the court overruled appellant's objection.

At the conclusion of the presentation of the evidence, appellant again moved for a judgment of acquittal which motion was again denied.

STATUTES INVOLVED

District of Columbia Code

Title 14-306(a). Husband and wife.

In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other.

Title 14-306(b). Husband and wife.

In civil and criminal proceedings, a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage. (Dec. 23, 1963, 77 Stat. 519, Pub. L. 88-241, § 1.)

Federal Rules of Criminal Procedure

Rule 52(b). Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The testimony of the wife with regard to the actual commission of the crime and with regard to certain statements and acts of her husband which she had witnessed during marriage, should not have been permitted, as these were "confidential communications" within the purview of Title 14, D.C. Code, Section 306(b).

II

At the time that the wife testified, it was the duty of the trial court not only to explain to her that her testimony could not be compelled, but to tell her specifically that under no circumstances was she to testify as to any "confidential communications" which she may have received or observed during marriage. It was the further duty of the court to explain fully the nature and meaning of "confidential communications," and that they, as such, went beyond being merely utterances or written words, but would include all information or knowledge privately imparted and made known by one spouse to the other by virtue of and in consequence of the marital relationship through conduct, acts, signs, and spoken or written words.

III

The trial court should not have allowed a witness to testify who came to court with the main prosecution witness, who sat in the court with the main prosecution witness, whose testimony corroborated the main prosecution witness' when such witness was improperly used on rebuttal, and appeared in the court with the knowledge of the United States Attorney after the judge had expressly ruled that all witnesses be sequestered.

ARGUMENT I

By common law, husband and wife were incompetent as witnesses for or against each other. The Supreme Court of the United States has, however, made certain exceptions to the strict common law, and in Funk v. United States, 290 U.S. 371, 78 L.Ed. 369, 54 S.Ct. 212 (1933), rejected the phase of the common law rule which excluded testimony by spouses for each other. However, the evidentiary rules governing testimony of spouses as witnesses in the courts of the District of Columbia differ from those rules in other federal courts. Griffin v. United States, 336 U.S. 704, 69 S.Ct. 814, 819 (1949).

The common law rule rendering inadmissible confidential communications between husband and wife is now embodied in Title 14, D.C. Code (1965 Supp.), Paragraph 306(b).

In Postom v. United States, 116 U.S. App. D.C. 219, 322 F.2d 432, 433 (1963), this court had occasion to interpret Title 14, Paragraph 306, D. C. Code (1961):

> "In both civil and criminal proceedings husband and wife shall be competent but not compellable to testify for or against each other".

This court held there was no reversible error in allowing wife of accused to take stand as a Government witness over accused's objection when the wife did not actually testify against him. In this case, however, the court stated at Page 432:

> "Because of the quoted provision of the D. C. Code, we think that outside the presence of the jury the trial court should tell one who is called to testify for or against his spouse that his testimony cannot be compelled but may be received if volunteered".

In the Postom case no mention was made of another pertinent section of the D.C. Code (1965 Supp.), then Title 14, 307, now Title 14, 306(b), which states:

> "In civil and criminal proceedings, a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage."

This provision of law makes inadmissible any testimony by one spouse as to confidential communications between husband and wife during the marriage.

Marital communications are presumed to be confidential. Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951); Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617, 618, (1934); Wigmore, EVIDENCE (McNaughton, Rev. Ed. 1961) § 2336.

While the words of the statute are "confidential communications," the incompetency of the spouse to testify should also include those "acts" which are intended to be "confidential communications." [See People v. Daghita,(N.Y. 1949), 299 N.Y. 194, 198-199, 86 N.E. 2d 172, 174, 10 A.L.R. 2d 1385, and annotation, 10 A.L.R. 2d 1389. See also Menefee v. Commonwealth, (Va. 1949), 189 Va. 900, 911-912, 55 S.E. 2d 9, 15.]

This specific question requires a judicial determination of the scope of the meaning of the words "confidential communications." The question of whether "acts" can be "confidential communications" has never been decided in the District of Columbia, although it has been considered in other jurisdictions. Certain cases on this point are collected in an annotation at 10 A.L.R. 2d 1389, entitled "Communications Within Testamonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived From Observation by One Spouse of Acts of Another Spouse."

The majority view is that the terms "communication" or "confidential communication" mean more than oral conversations between husband and wife. In Todd v. Barber, (Ky. 1943), 271 Ky. 381, 111, S.W. 2d 1041, the court, in interpreting a Kentucky statute said:

> "The word 'communication,' therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or vice versa, but should be construed to embrace all knowledge upon the part

of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party."

See also People v. Sullivan, (N.Y.,), 42 Misc. 2d 1014, 249 N.Y.S. 2d 589.

In deciding this very point, the Supreme Court of Appeals of Virginia in Menefee v. Commonwealth, supra, page 9, stated:

"The weight of authority, and in our opinion, on principle, the better view, extends the privilege beyond mere utterances or written words. Inherent in the privilege is the fundamental purpose to protect from public exposure confidences of the marital relation.

"It is far better that occasional hardships be suffered and that crime sometimes go unpunished than to limit confidential communications between husband and wife to mere spoken or written words. That would render susceptible of and expose to public observation and knowledge all confidential conduct, transactions and acts not consisting of spoken or written words, which the continued tranquility, integrity and confidence of their intimate relation demands to be shielded and protected by the inviolate veil of the marital sanctuary. The purpose and security of the privilege would be partially and materially defeated and destroyed by any less inclusive interpretation of the language of the statute.

"It is difficult to formulate any rule by which various matters transpiring between spouses may be readily catalogued and correctly classified as "communications privately made." Yet, in our opinion the immunity and ban of the statute applies to and includes all information or knowledge privately imparted and made known by one spouse to the other by virtue of and in consequence of the marital relation through conduct, acts, signs, and spoken or written words."

Applying the interpretation of the Supreme Court of Virginia, supra, that the immunity and ban of the statute applies

to and includes all information or knowledge privately imparted and made known by one spouse to the other by virtue of and in consequence of the marital relation through conduct, acts, signs and spoken or written words, the following testimony of appellant's spouse would be excluded:

1. All testimony relating to her prior view of the gun.

2. All testimony indicating that she knew exactly what he was reaching for when he reached into his belt.

3. All testimony relating to the husband stating that he would be outside the house watching for her.

4. All testimony relating to the husband stating that he was going to kill Francis Henry Clark.

5. All testimony relating to the children.

6. All testimony concerning the happiness or unhappiness of their marriage, the fact that the husband had a girl, and the testimony relating to the wife's pregnancy.

In addition, it is urged that all of the testimony of the spouse of appellant concerning the actual witnessing of a criminal act should be excluded, as this, too, arose out of the confidences inspired by the marriage relationship. As the wife said in response to the following question (Tr. 89):

> "QUESTION: Now, Mrs. Butler, I will ask you one other question. If you had not been out with Francis Clark at 4 o'clock in the morning on September 5, 1964, your husband would not have shot him.
>
> A. I guess it's right."

Here we have the appellant, attempting in his own mind to defend the sanctity of his marriage and his family, committing a criminal act in the presence of his spouse. In such a situation, we urge that the spouse should not be permitted to testify. We respectfully urge to this court that the admission of the wife's testimony under the circumstances of this case was "plain error" within the purview of Rule 52(b) of the Federal Rules of Criminal Procedure. In this connection, see Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed. 2d 125 (1958), wherein the court stated:

> "Notwithstanding the error in admitting the wife's testimony, we are urged to affirm the conviction upon the alternative holding of the Court of Appeals that her evidence was harmless to petitioner. See Fed. Rules Crim. Proc. 52(a). But after examining the record we cannot say that her testimony did not have substantial influence on the jury. See Kotteakos v. United States, 328 U.S. 750, 764, 765, 90 L.Ed. 1557, 1566, 66 S.Ct. 1239." . . .
>
> ". . . The mere presence of a wife as a witness against her husband in a case of this kind would most likely impress jurors adversely."

ARGUMENT II

Out of the presence of the jury and subsequent to the commencement of the testimony of the spouse of appellant, the court, in obedience to the precepts laid down in Postom v. United States, supra, page 8, instructed the spouse as follows:

> "Now, in order that we may be fully certain in this regard, I wish to say to you that while you are competent to testify, that is, you may testify, you cannot be compelled to testify, either for or against your husband upon this trial . . . . "

The court further instructed the witness:

> "Do you further understand that you are not competent to testify, that is, you cannot testify even if you wish to, with reference to any confidential communications made by one of you to the other during the time that you were married? . . . "

A lay witness, testifying for presumably the first time, would not necessarily know the judicial interpretation of "confidential communication" and would not know what matters, sayings or acts would fall within that definition. In that regard, the trial court should have fully explained the meaning and definition of "confidential communications." Since the immunity and bar of Title 14, D.C. Code, Paragraph 306(b) includes all information or knowledge privately imparted and made known by one spouse to another by virtue of and in consequence of the marital relationship through conduct, acts, signs and spoken or written words, this definition should have been explained to the witness so that she would not have testified as to such confidential communications. The various confidential communications testified to by this witness are summarized in Roman numeral I above and are set forth more fully in the Statement of Facts. The receipt of this testimony was plain error affecting substantial rights of the appellant.

ARGUMENT III

At the conclusion of the presentation of evidence for the Government and for the defense, the Government brought on as a witness one Mary Alice Williams. It was conceded by the Government that in spite of the rule which required the sequestration of witnesses, this witness had been present during a portion of the conduct of the trial. In addition, the witness had entered the courtroom with the spouse of the appellant, had sat in the courtroom with the spouse of the appellant, was an old friend of the spouse of the appellant, and her testimony merely corroborated that testimony previously given in chief by the spouse of the appellant. As this court has said in Charles P. B. Pinson, Inc. v. Federal Communications Commission, (AppDC 1963) 321 F.2d 372, 375, "absent unusual circumstances, such practice is disapproved," citing cases collected at 53 Am.Jr., "Trial," paragraphs 31-32.

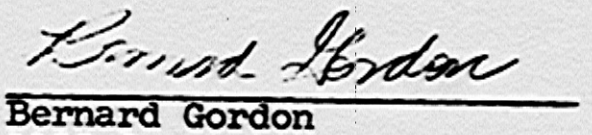
In the instant case, this witness who testified only on rebuttal was knwn to the Government throughout the case. She could and should have been available for testimony at the presentation of their evidence in chief, and it was error to permit her to testify in "rebuttal." This witness was a close friend of the chief prosecution witness who had ample opportunity to go over with the spouse of the appellant her prior testimony, and in general to know the questions and answers which had previously been given. Her use as a witness to merely corroborate the only

substantial Government witness, was unfair to appellant and she should not have been allowed to testify in the case.

CONCLUSION

For the aforementioned reasons, the decision of the lower court should be reversed.

Respectfully submitted,



Bernard Gordon
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,274

DAVID R. BUTLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JEROME NELSON,
Assistant United States Attorneys.

Cr. No. 902-64

QUESTIONS PRESENTED

1. The appellant, estranged from his wife, killed a man whom he found escorting her. The wife was an eyewitness to the shooting and was a principal government witness at trial, where the issue was self-defense. The question is whether a few items in her testimony, never objected to at trial, involve "confidential communications" and constitute plain error.

2. Whether the trial judge abused his discretion by ruling that a rebuttal witness might testify despite having been present during testimony of two prior rebuttal witnesses, where the testimony of the prior witnesses was wholly unrelated to the testimony of the witness in question.

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,274

DAVID R. BUTLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a jury trial in the District Court (Robinson, J.) appellant, charged with second degree murder, was convicted of manslaughter and sentenced to 32 months to eight years imprisonment. The evidence, sufficiency of which is not questioned on this appeal, shows in substance that appellant shot and killed one Clark who was, at the time of the incident, escorting appellant's estranged wife. Appellant claimed unsuccessfully that the killing occurred in self defense.

The incident occurred at about 4:30 a.m. near the residence of the wife. Appellant said that at about 4 a.m.

he parked his car near the home in order to wait for daylight so that he might give his wife some money and discuss the purchase of shoes for one of the children (Tr. 235, 286-288). Other evidence showed that from May to late August appellant had been paying support money into a Virginia court in compliance with an order (Tr. 357-358).

Appellant sat in the car for ten or fifteen minutes, a loaded gun stuck in his belt (Tr. 296-297). He explained that he obtained the gun two or three months previous and had it on this occasion for protection, stating that some male friends of the wife had previously threatened him (Tr. 240-241, 292, 263, 308).

Eventually he heard a noise and then observed his wife and the deceased who, according to appellant, had his belt, pants, and zipper open and was putting in his shirt tail (Tr. 238). Appellant had never seen the deceased before (Tr. 315). Appellant—pistol in belt—got out of the car and began a discussion with the deceased. After the deceased became aware of the fact that appellant was the husband he swore and several times asked appellant what he was going to do about it (Tr. 238-239). Ultimately, according to appellant, the deceased said: "You can kill me, mother fucker, I ain't got but one time to die and you ain't neither, mother fucker" (Tr. 239). At this point the deceased kept walking toward appellant with one or both hands in pockets (Tr. 239, 302). Appellant said that he was backing away (Tr. 239). When the deceased came to within six or eight feet, appellant removed the gun and shot him (Tr. 239, 302). Appellant testified that he was frightened, acted on impulse, and feared the deceased would do him bodily harm (Tr. 239-240). Appellant did not know whether the deceased had any weapon, but admitted that had there been a gun in the deceased's belt he would have seen it (Tr. 240, 304). He also said that under the conditions at the time the deceased "should have" seen the gun in his belt (Tr. 304-305).

After firing the gun appellant said that his wife asked "What are we going to do about the children" (Tr. 243). At this point appellant observed someone running, became frightened, told his wife to "take care of the children" and left in his car (Tr. 243-244). He then went to his rooming house and from there to Haymarket, Virginia where he was apprehended.

At the rooming house he had a conversation with the landlord who testified for the government. The landlord said that appellant told him he had shot a man and explained

> "* * * he seen a man walking down the street with his wife, kissing his wife and he said something to him. And the man pulled his pants down and told him to * * * kiss his black ass" (Tr. 182-183).

The principal witness for the government was the estranged wife. Prior to receipt of her testimony, the following occurred:

> (The following proceedings occurred out of the presence of the jury:)
>
> THE COURT: Mrs. Butler, you previously testified that you are the wife of David R. Butler who is the defendant in this case, is that correct?
> THE WITNESS: Yes.
> THE COURT: And when was it that you married the defendant, David R. Butler?
> THE WITNESS: January 17th, 1959.
> THE COURT: It is my understanding that you have been advised by the Assistant United States Attorney in charge of this case, Mr. Sidman, that you cannot be compelled to testify in this case, is that correct?
> THE WITNESS: Yes, I have.
> THE COURT: Now, in order that we may be fully certain in this regard, I wish to say to you that while you are competent to testify, that is, you may testify, you cannot be compelled to testify either for or against your husband upon this trial. Do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Do you further understand that you are not competent to testify, that is, you cannot testify, even if you wish to, with reference to any confidential communications made by one of you to the other during the time that you were married? Are you aware of that?

THE WITNESS: Yes, I am.

THE COURT: Very well. Now, with the information that you cannot be compelled to testify in this case, would you state to the Court as to whether or not you wish to claim your privilege not to testify in this case?

THE WITNESS: I wish to testify.

THE COURT: Very well. Mr. Kemp, Mr. Sidman, is there anything that you would like to ask of the witness?

MR. SIDMAN: No, Your Honor.

MR. KEMP: Did I understand you to say you wished to testify?

THE WITNESS: I said I wished to testify.

MR. KEMP: I have no further questions.

THE COURT: Very well. Is there anything further that you gentlemen would like to communicate to the Court?

MR. SIDMAN: No, Your Honor.

THE COURT: Are you both satisfied in this respect? Mr. Sidman.

MR. SIDMAN: Yes, Your Honor.

THE COURT: Mr. Kemp.

MR. KEMP: I am satisfied, Your Honor.

THE COURT: Will counsel step back to the bench just a moment.

(AT THE BENCH:)

THE COURT: I just thought I would get you back up here out of the hearing of Mrs. Butler to inquire as to whether or not there is any objection from the defendant's viewpoint to Mrs. Butler's testifying. If you want to make an objection, I will give you the opportunity to do it out of her presence.

MR. KEMP: Well, the Court has advised her of her rights in the matter that she may not be compelled to testify. Since she has elected to do so, I have nothing further.

THE COURT: I just wanted to get the thrust of your position. That was my original understanding, that you had concern, Mr. Kemp, as to whether or not she fully understood her rights in this regard; and upon being satisfied in that regard, there was no further objection by the defendant; but I thought I had better be certain of that.

Very well, Thank you, gentlemen.

The wife testified that she had been out to a club and met Clark—the deceased—who accompanied her home. She and Clark got out of the car in the vicinity of the wife's residence and four others who were in the car drove off. Clark was putting in his shirt-tail or fixing his clothes (Tr. 65, 67, 70). At this point she observed the appellant reaching "in his belt or somewhere in front" for a pistol which she had seen before (Tr. 39). Appellant then pulled the pistol and held it in his hand during the discussion which ensued (Tr. 40). The appellant yelled a "bad name" and asked "What is this supposed to be?" (Tr. 28). The wife told him that they were separated and not to cause any trouble. Appellant kept yelling, at which point Clark tried to tell the appellant that his walking with the wife should not be misinterpreted. Whereupon the appellant took the wife by her arm and shoved her toward Clark, stating "Get around there, I am going to kill you, too" and further said that he would kill Clark (Tr. 29). Clark said "I don't have but one time to die" and was then shot by appellant (Tr. 29). Appellant's wife testified that at no time did the deceased have a weapon, nor did he make any threatening gesture, assault, or swing toward the appellant (Tr. 40). The wife said that after the shooting she asked appellant "If you kill me, what is going to happen to the children" (Tr. 41). Appellant replied "Take care of the children" and left (Tr. 41).

In response the questions asked by defense counsel on cross-examination, the appellant's wife testified that she and Clark had stopped a block away from the residence because "my husband had said that he had been watching me" * * * (Tr. 62-63). Also on cross-examination, when asked if appellant had the pistol in his hand when she first saw him, the wife answered

> "Yes. He was getting out of the car and reaching all at the same time; and I knew it was coming out, because I knew where he always kept his gun" (Tr. 77).

At no time was there any objection to the wife's testimony on the ground of "confidential communication."

STATUTE INVOLVED

Title 14, District of Columbia Code, § 306, provides as follows:

> (a) In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other.
>
> (b) In civil and criminal proceedings, a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage.

SUMMARY OF ARGUMENT AND ARGUMENT

The isolated testimonial incidents, now alleged to involve "confidential communications", were not objected to below and are a far cry from "plain error." It is by no means "plain" that marital communications during a period of bitter estrangement can be regarded as arising out of confidence between the spouses. In any event the testimony itself was of no significance. Two of the items—that the wife had seen appellant's gun before and that she knew that he was reaching for it prior to the killing—involve observations and not "communi-

cations." Even if the privilege were extended to such observations, a point which is not at all "plain", still their substance was also established by the testimony of appellant himself, who admitted possessing the gun for some time, removing it from his belt, and shooting Clark on the night in question. The wife's testimony as to appellant having warned that he was "watching" her was invited by the question of defense counsel, who asked why she and Clark had parked a block from her residence. Appellant's statements to the effect that he was going to kill Clark and the wife were both made in the presence of Clark and were thus beyond the scope of the privilege. That before leaving the scene appellant told his wife to "take care of the children" was established by his own testimony as well as hers. In any event, the post-shooting conversation, viewed in its worst light, showed that appellant refrained from shooting his wife because of concern for the children, a fact which could not damage him in the eyes of the jury. The state of the marriage and appellant's dealings with other women were apparent to third parties, some of whom testified, and were in no sense "confidential." Moreover, appellant himself testified to most of these matters. Nor can the fact of the wife's pregnancy by another man be regarded as a "confidential communication." This testimony was developed by defense counsel as part of a strategy to discredit the wife and create sympathy for the appellant's position. In the context of a trial where the sole question was whether appellant killed Clark in self-defense, those fragments of the wife's testimony, now argued as violating the marital privilege, do not amount to "plain error or defects affecting substantial rights."

Judge Robinson did not abuse his discretion in ruling that one rebuttal witness might testify despite the fact that she had been present when two prior rebuttal witnesses testified. As the judge reasoned, her testimony

involved a wholly different aspect from that of the two other witnesses.[1] In these circumstances the purpose of an exclusionary rule is not violated. *Witt* v. *United States*, 196 F.2d 285 (C.A. 9, 1952), *cert. denied*, 344 U.S. 827.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JEROME NELSON,
Assistant United States Attorneys.

[1] The prior rebuttal witnesses dealt with the Virginia support order and appellant's living with another woman. The witness in issue dealt with events on the evening in question prior to the shooting.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 786499 173